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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 602

CAVOUR HARTLEY, EXECUTOR OF THE ESTATE OF G. G. HARTLEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. B. FRYBERGER,
H. C. FULTON,
E. L. BOYLE,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Cavour Hartley, as executor of the Estate of G. G. Hartley, deceased, respectfully prays that a writ of certiorari issue to review a decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on July 6, 1934 (72 F. (2d) 352), which decision and judgment affirmed in part and modified in part an order of the United States Board of Tax Appeals promulgated (March 16,

1933, 27 U. S. Bd. Tax. App. 952) in favor of the respondents and against the petitioners herein.

A petition for a rehearing of said matter was subsequently filed with the United States Circuit Court of Appeals for the Eighth Circuit and denied by the court on the 17th day of October, 1934 (R. 128).

Question Presented.

The sole question presented is whether in determining taxable income of decedent's estate, pending administration, the basis for computing gain or loss on sale, and depletion and depreciation of, properties of a decedent is the cost (or March 1, 1913, value) thereof to the decedent or the fair market value of same at the date of death of the decedent.

The taxpayer is the executor of the estate of G. G. Hartley, who died January 11th, 1922, leaving real, personal and mixed property valued at approximately $3,000,000.00 and producing about $200,000.00 gross income annually. Among the properties were about fifteen iron mines operated under royalty leases and several thousand pieces of real estate consisting of farms and city properties, improved and unimproved. The personal property not important here, consisted of a miscellaneous quantity of investment and income securities (R. 85 to 97).

The taxpayer duly filed his tax returns for 1924 and 1925. In the 1924 return he reported a loss of $1,184.39 and in the 1925 return he reported a gain of $255.05 from a sale of capital assets. Deductions were claimed for depreciation of iron mines in the amount of $41,663.62 for 1924, and $67,272.81 for 1925. The gain or loss on the sale of capital assets and the deduction for depletion and depreciation, as reported on the returns, were computed on the basis of the value of the several properties at the date of the decedent's death.

These returns were in compliance with the regulations of the Treasury Department existing at that time. Regulations 62, Art. 343 (1921 Act); Regulations 65, Art. 343 (1924 Act); and Regulations 69, Art. 343 (1926 Act). The regulations of the Department were amended on April 6, 1927, and the basis changed from value at date of death of decedent to cost to decedent. (T. D. 4011, VI-1 C. B. 77.) On July 7, 1928, the regulation was again changed to the basis of value at the date of death of the decedent. (T. D. 4177, VII-2 C. B. 134.) Upon audit of the returns, the Commissioner made numerous adjustments of profits from sales and of depreciation and depletion and determined the deficiencies in tax. On July 27, 1928, the taxpayer filed with the Commissioner a written election not to have the income tax returns of the estate governed by provisions of sub-section 702 (a) of the Revenue Act of 1928 (R. 20).

The value of the properties at the date of decedent's death and deductions for depletion and depreciation and the profit or loss on sales computed on the basis of the properties in the hands of the decedent (cost or March 1, 1913, value) were stipulated and the question submitted to the Board was whether the proper basis for computing gain or loss and depletion and depreciation is the value of the properties at the date of the decedent's death, as contended by the Commissioner, or the basis of the properties in the hands of the decedent—cost or March 1, 1913, value—as contended by the taxpayer (R. 34-35).

The Board of Tax Appeals held that the basis for computing gain or loss and depletion and depreciation was the value of the properties at the date of the decedent's death and the United States Circuit Court of Appeals for the Eighth Circuit sustained the Board in its decision.

The Reasons for Granting the Petition.

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in holding that in computing gains and losses from sales of property and of depreciation of properties, the basic value is that of value at the date of death of the testator and not that of acquisition cost to the testator (or March 1, 1913, value) as contemplated by the applicable sections of the Revenue Acts of 1921 (Section 202 (a) (b), 42 U. S. Stat. at L. 229, and Section 219, 42 U. S. Stat. at L. 246, Chapter 136), and 1924 (Section 204 (a) (b), 43 U. S. Stat. at L. 258, and Section 219, 43 U. S. Stat. at L. 275, Chapter 234).

2. The United States Circuit Court of Appeals for the Eighth Circuit erred in applying to this case the decision of this Court in the case of *Brewster* v. *Gage*, 280 U. S. 327, in which case the controversy was whether acquisition for tax purposes by residuary legatee of personal property was the date of death of the testator or date of distribution to the legatee, and the language used therein and regarded by the United States Circuit Court of Appeals for the Eighth Circuit as on the very edge of controlling authority was merely argumentative and dicta.

3. The United States Circuit Court of Appeals for the Eighth Circuit erred in rejecting the doctrine established by the decisions of the Court of Claims holding that the true basis was the value on March 1, 1913, or cost of acquisition to taxpayer, in the cases of *McKinney* v. *United States*, 62 Ct. Cl. 180 (cer. denied 273 U. S. 716); *Elmhirst* v. *United States*, 38 F. (2d) 915 (same as *Straight, Executrix*, 7 B. T. A. 177), (cer. denied 282 U. S. 851); *Myers* v. *United States*, 51 F. (2d) 145, and in rejecting the petitioner's contention that the denial of the writ of certiorari

in those cases by this Court indicated the approval of the doctrine by this Court.

4. The question involved is one of importance and involves other similar conditions by taxpayers as appears by the brief *amici curiæ* filed in the United States Circuit Court of Appeals in this case. The question involved is important to taxpayers and to the Government.

5. The decision of the United States Circuit Court of Appeals for the Eighth Circuit is in conflict with the decisions of the Court of Claims and has decided an important question of general law in conflict with the weight of authority. *McKinney* v. *United States*, 62 Ct. Cl. 180 (cer. denied 273 U. S. 716; *Elmhirst* v. *United States*, 38 F. (2d) 915 (same as *Straight, Executrix*, 7 B. T. A. 177) (cer. denied 282 U. S. 851); *Myers* v. *United States*, 51 F. (2d) 145, and *McCann* v. *United States*, 48 F. (2d) 446; and *Nichols* v. *United States*, 64 Ct. Cl. 241 (cer. denied 277 U. S. 584.)

For these reasons it is respectfully submitted that this petition for writ of certiorari to review judgment of the United States Circuit Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 20) is reported in 27 B. T. A., page 952. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 112) is reported in 72 Federal (2d), page 352.

Jurisdiction.

The petition for rehearing was denied by the Circuit Court of Appeals for the Eighth Circuit on the 17th day of October, 1934 (R. 128). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. The petition for certiorari was filed December 27, 1934.

Questions Presented, Statutes Involved, etc.

A statement of the question presented, specification of errors, a statement of the case, and the statutes and regulations involved will be found in the petition.

ARGUMENT.

The question in this case is whether the true basis for computing gain or loss upon sales by the executor of an estate and depletion and depreciation of the property is the value at the date of decedent's death, or the cost to decedent (or March 1, 1913, value). The former is termed the "old basis" and the latter the "new basis."

This question was submitted to the Board of Tax Appeals by stipulation of the parties as a pure question of law and the decision of the Board adopted as the basis of the value at the time of decedent's death. Upon the taxpayer's appeal this decision of the Board was sustained by the Circuit Court of Appeals for the Eighth Circuit. The Commissioner filed a cross-appeal upon another proposition. Upon motion the appeals were consolidated and heard together by order of court and the decision of the Board of Tax Appeals was modified upon this cross-appeal. The proposition involved in the cross-appeal is not material here and is not in any way involved or affected by the question here. (R. 108 and 121.)

The laws applicable to the question here are the 1921 and 1924 statutes.

The 1921 statutes to be interpreted read as follows:

> "SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *"

"(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a);—

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income."

42 U. S. Statutes 227, Section 202 (a) and (b).

The 1924 statute does not differ materially from that of 1921 upon this proposition. 43 U. S. Stat. at L. 258, Sec. 204 (a) (b).

The Act of 1924, Section 204, sub-division (c), also fixed the basis for depletion and depreciation the same as provided in (a) or (b) for gain or loss from sales. These provisions were generally applicable to all taxpayers without specific mention of gains or loss from sales by executors or administrators and it was not until the Revenue Act of 1928 (45 Statutes 791) that Congress declared a rule specifically applicable to gains or losses from sales by executors or administrators from property of the testator. (45 U. S. Statutes 791, 819, Sec. 113 (a), sub-division 5.)

Commissioner's Regulations 45, 62, 65, Art. 343, were practically identical in interpreting the Revenue Acts of 1918, 1921, 1924, fixed the basis as follows:

> "Wherever the executor sells property of the estate for more than its value at the time of the death of the decedent, the excess is income taxable to the estate."

On May 3, 1926, the Court of Claims in the case of *McKinney* v. *United States*, 62 Ct. Cl. 180, interpreted the 1918 Statute—which was not materially different upon this proposition from these later statutes, as fixing the true basis as the cost to the testator (or March 1, 1913, value), and not the market value at the date of death of the testator. In the light of this decision, and after the denial of the petition for writ of certiorari by this Court, the Commissioner amended his regulation to conform to the decision.

The ground of the court's decision was that the statute had for its purpose the taxation of "gain derived from the sale" of property, based upon the difference between the original investment and the sale price, and the allowance of loss sustained measured in the same way, and that to adopt as the basis the appraised value at the time of death of the testator would, in many cases, amount to the assessing of taxable gain although there was an actual loss as between the purchase price and the sale price, or between the March 1, 1913, value and the sale price.

The court's decision and its reasoning was based upon the decisions of this Court in the *Goodrich* case, where the original cost was greater than the March 1, 1913, value and the selling price was less than the cost, but greater than the March 1, 1913, value, and the court held that there was no profit (*Goodrich* v. *Edwards*, 255 U. S. 527); and upon the *Walsh* case, where the cost was greater than the March 1, 1913, value and the same as the selling price and this Court held there was no profit; and again in the same case,

where the cost was greater than the March 1, 1913, value but less than the selling price, that the profit was limited to the excess of the selling price over the cost (*Walsh* v. *Brewster*, 255 U. S. 536). Also the *Flannery* case in which the cost was less than the March 1, 1913, value and the selling price was more than the cost but less than the March 1, 1913, value, and this Court held there was no loss. (*United States* v. *Flannery*, 268 U. S. 98.) In other words the Court of Claims adhered to the doctrine of "actual gains and losses" and so interpreted the decisions of this Court.

The Commissioner having amended his regulations to conform to this decision of the Court of Claims, for a period of fifteen months from April 6, 1927, to July 7, 1928, all adjustments were made upon this "new basis" of cost to the testator.

The Court of Claims in the meantime had handed down its decision in the case of *Nichols* v. *United States*, 64 Ct. Cl. 241, holding that commissions of a partner earned by the firm prior to his death, but collected by the executor after his death—both the partner and his executor keeping their accounts on a cash receipt basis—was a part of the corpus of his estate and not subject to tax as income. The Commissioner interpreted this decision as a reversal by the Court of Claims of its prior decision in the *McKinney* case, and changed the Regulation back to the "old basis" of value at the date of death of the testator.

A Federal District Court in the Southern District of New York in the case of *Bankers Trust Company* v. *Bowers*, 23 Federal Reporter (2d ser.), page 941, adopted the so-called "old basis" rule basing the decision upon the ground that the court was unable to reconcile the decision in the *Nichols* case with the decision in the *McKinney* case. The Board of Tax Appeals, in the case of *Dorothy Payne Whitney Straight, Executrix*, v. *United States*, 7 United States

Board of Tax Appeals, page 177, with four members dissenting, also re-affirmed the "old basis", but this decision was overruled by the Court of Claims in the case of *Elmhirst* v. *United States,* 38 Federal Reporter (2d ser.), page 915, hereinafter cited, and which is the same case on appeal as *Dorothy Payne Whitney Straight, Executrix,* case.

With the Court of Claims laying down one basis and the Board of Tax Appeals and this Federal District Court using a different basis, a condition of confusion existed and the executors of estates were filing some under one basis and some under the other (R. 22). Congress then sought to put an end to this chaotic condition and in the Revenue Act of 1928 specifically provided that from and after May 29, 1928, the basis should be the value at the death of the testator. Congress, however, did not make the Act retroactive but specifically provided that where returns of such gains or losses had been made for a prior tax year on either basis, in accordance with the regulations in force at the time such return was filed, such basis should control unless a claim for refund in respect to such basis was made or a written election not to come within the provisions of this subsection was filed by the estate. (45 Statutes at Large 819; 45 Statutes at Large 879, Sec. 702.)

Petitioner here duly filed such written election and therefore is not bound by this subsection. Subsection (b) of this Section 702 declares that where Subsection (a) does not govern the basis for such gain or loss "shall be such basis as is in accordance with the law properly applicable thereto without any regard to the provisions of this Act." This, then, puts the petitioner back in the position of being bound by the law as set forth in the Statutes of 1921 and 1924, *supra,* and leaves to the court the question of deciding what the law actually is.

On March 3, 1930, the Court of Claims in the case of *Elmhirst* v. *United States,* 38 Federal Reporter (2d ser.),

page 915 (petition for writ of certiorari denied, 282 U. S. 851), reaffirmed its decision in the *McKinney* case, *supra*, and distinguished the *Nichols* case, *supra*, and again held that the proper basis was the cost to the testator (or the March 1, 1913, value). The court again bases its decision upon its former interpretation of the statute and held that the plain theory of Section 202—corresponding to Section 204 in the later Acts—and the purpose in the mind of Congress was to fix definitely the basis for estimating "actual profits" as distinguished from "fabricated" or "invented" profits. That the word "acquired" in the statute referred to the purchaser or owner, and that an executor does not acquire property in the sense of purchasing it—that it passes to him by operation of law; that the statute having specifically provided that where the purchase was prior to March 1, 1913, the basis was the market value as of March 1, 1913, and where the purchase was made prior thereto, it could not possibly be the market value at any other time and certainly not the value at the date of the death of the testator; that to make the value as of the death of the testator would be a plain alteration and change in the statute and its declared purposes, a palpable ignorement of its language and meaning. The court further declares:

> "'The conclusion, therefore, is unescapable that in dealing with property purchased on or after March 1, 1913 (paragraph (2) of Section 202), Congress intended the same principle and rule of entity to apply when it fixed the 'basis' as the 'cost thereof' when 'acquired' and meant 'cost' at the time when 'acquired' by the testator and not cost on or after his death. Any other construction does as much violence to the conceded purpose of the statute as it would to apply it to paragraph (1), Section 202, and to make the basis of value of a purchase prior to March 1, 1913, the value at the death of the testator. To hold other-

wise is to amend the statute and graft something on it that was not put there by Congress."

The Court of Claims again re-affirmed the same rule in the case of *Myers* v. *United States*, 51 Federal Reporter (2d ser.), page 45, and re-affirmed the doctrine in *McCann* v. *United States*, 48 Federal Reporter (2d ser.), page 446, and in the latter case distinguished between a gain to the estate of the heir of the decedent and a gain to the estate of the decedent, and held that the value at the date of the death of the decedent was the basis of value for determining gain or loss to the estate of the heir of the decedent.

We have then the unbroken line of decisions of the Court of Claims interpreting the statute as meaning "actual profits" based on the "actual gain or loss" between the purchase and the selling price, as distinguished from "fabricated or invented profits" based upon the appraised value at the death of the testator. For the second time the Court of Claims again bases this doctrine of actual profits as distinguished from fabricated profits, upon the decisions of this Court in the three cases already relied upon by it in the *McKinney* case.

The Court of Claims also points out that Congress in this 1918 Statute—and it is carried forward in the Statutes of 1921 and 1924 here in question—did, in a certain class of cases, depart from "cost" basis and provided the "inventory" value basis as a substitute basis for the "cost" basis, which the court declares indicated, in that particular, and in that particular only, was an exception to be made as to cost as a basis, and with that exception that cost was to be the basis; that had Congress so intended, while it was making this exception in the case of a trade or business for an inventory basis, it could have provided in the sale by the purchaser's executor, after the death of the purchaser, the basis should be not "cost" to the purchaser but the differ-

ence between the sale price and the value of said property at the time of purchaser's death; but Congress not having done this, the court could not read into the statute something which was not there.

With these decisions of the Court of Claims, the Circuit Court of Appeals for the Eighth Circuit, in the case at bar, differs, and it is because of this contrary holding of these two courts that the petitioner herein bases his claim to a writ of certiorari to review the decision of the Circuit Court of Appeals. Petitioner contends that it is not equitable, nor just, nor a proper carrying out of the income tax laws of the Federal Government to have a different basis of estimating gains and losses for different taxpayers, nor is it seemly to have one taxpayer held for gains or denied losses, under the same statute, while another taxpayer similarly situated has been released from tax upon gains or allowed his losses, because of different interpretations of the same statute by different courts.

The Circuit Court of Appeals of the Eighth Circuit in its opinion herein, after referring to the differing decision of the Court of Claims, Federal District Court, and the Board of Tax Appeals, declares that the question is "far from being free of doubt" but that the predominance is in favor of construing the intent of Congress to be that the basis should be value at death of the decedent rather than "acquisition value" of decedent. In reaching this conclusion as to the predominance of the two opposing lines of decisions the Circuit Court of Appeals was constrained to so hold by the language used by this Court in the case of *Brewster* v. *Gage*, 280 U. S., page 327.

The language used by this Court (pages 335 and 336 of the opinion) is as follows:

> "The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and

such gains are calculated on value at date of decedent's death. There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another."

The Circuit Court of Appeals refused to accept the petitioner's contention that this language was merely *obiter* and used by way of argument and upon a different proposition than is here involved, that that case involved the basis for gain or loss from a sale by the heir and not by the executor and that the difference between the profit to the estate and profit to the heir or estate of the heir, had been clearly pointed out by the Court of Claims in the *McCann* case above cited. The Circuit Court of Appeals conceded that the controversy there was whether acquisition by the heir for the purpose of tax purposes was the date of death of the testator or the date of distribution to a legatee, but held that while the question there was different from that involved here, the language used by the court was the expression of its reason for its decision; and that the language used by this Court was not lightly used and may not lightly be put aside.

Petitioner respectfully contends that too much importance was attached by the Circuit Court of Appeals to the language used by this Court in the *Brewster* v. *Gage* case. In attempting to interpret the opinion of this Court in that case we most respectfully submit that the question of the statutory basis for determining gain or loss in a sale by an executor was not involved. The briefs submitted therein show that that question was not even argued. The 1921 Act there interpreted specifically provided that "property acquired by bequest, devise or inheritance the basis shall be the fair market price or value of said property at the time of such acquisition" and the only question involved was whether the time of such acquisition was the date of the death of the testator or the date of the decree of dis-

tribution. We submit that the language used by the Honorable Associate Justice must be taken in connection with the point there involved.

The decision in *Brewster* v. *Gage* was handed down in January, 1930, while the decision of the Court of Claims in the *Elmhirst* case, re-affirming the rule of cost to the decedent, was handed down in the following March, showing that the Court of Claims did not consider the decision of this Court in *Brewster* v. *Gage* as deciding the question of the proper basis of determining gains or losses by an executor.

In the petition for writ of certiorari in the *Elmhirst* case it was specifically urged by the Government in justification of the petition that the point there in issue had been decided adversely by this Court in the *Brewster* v. *Gage* case.

Petitioner urged upon the Circuit Court of Appeals, and now respectfully contends, that the denial by this Court of the writ in that case showed that this Court did not consider the later decision of the Court of Claims inconsistent with the decision of this Court in the *Brewster* case.

The only other case cited with approval by the Circuit Court of Appeals herein, other than the decisions of the Board of Tax Appeals—*Bankers Trust Company* v. *Bowers*, 23 F. (2d), page 941, was put forward by the Government in the petition for writ of certiorari in the *Nichols* case, and was again put forward, together with the approving though not similar case of *Eldridge* v. *United States*, 31 F. (2d), page 924, in support of the petition in the *Elmhirst* case, but both petitions for the writ were denied by this Court.

Petitioner has adopted as his own the interpretations put upon this Act of Congress by the Court of Claims fixing acquisition cost as the true basis for determining gains or losses on sale by executor, as the reasoning therein is so

concise, discerning and comprehensive that nothing can be added to it by re-statement. However, if the United States Circuit Court of Appeals for the Eighth Circuit is correct in its conclusion as to the effect of the language used by this Court in the *Brewster* v. *Gage* case then petitioner must concede that the decision of the Circuit Court of Appeals rather than the Court of Claims is the correct interpretation of the Act of Congress. Petitioner contends that the Circuit Court of Appeals has read into the decision of this Court more than was intended by the Honorable Associate Justice in the language there used.

The distinction between a sale by an heir or legatee and a sale by an executor, it seems to us, is important. The statute governing the former specifically provides that the basis for the sale by the heir or legatee is his acquisition value while the statute applicable to an executor uses the general expression, cost or March 1, 1913, value. Again the sale by an heir or legatee is voluntary, while the sale by an executor is almost always involuntary, forced by the compelling need of raising funds to pay the debts of the estate of decedent. The executor has no choice but to sell the assets and to pay the debts, and he often has little choice even as to the time of sale. Could it have been the intention of Congress to impose such a hardship on the estate of a decedent?

This Court in the cases above cited has held that it was not the intention of Congress to impose a tax upon a living taxpayer when the selling price was greater than the March 1, 1913, value, but not greater than the acquisition cost although the language of the statute taken literally might, and did in the belief of the Treasury Department, justify such a levy. This Court went behind the literal wording of the statute and applied the equitable rule of "actual gains" and that there could be no actual gain

where there was no excess in the selling price over the acquisition cost though the former was greater than the March 1, 1913, value. Why should Congress intend a harsher rule for a dead man than for a living taxpayer?

The literal interpretation of the 1921 and 1924 Acts of Congress as well as the 1918 Act do not require such interpretation even to meet the literal wording of the statute for the statute is most general in terms and merely makes an estate a taxpayer and subject to an income tax the same as a living person, but the only language used is cost or March 1, 1913, value, and the Honorable Circuit Court of Appeals read into the statute the concept that cost to the executor—namely, the appraised value at the date of death of the decedent—is what Congress intended. This theory of cost to the executor being the appraised value at the date of death of the decedent is interpretive rather than statutory, for, in fact, there can be no cost to the executor and the whole theory results in separating the decedent and the executor in a way that is incompatible with their relationship, for the executor is merely the representative of the decedent to pay the debts and turn over the residue to the heirs and legatees.

Petitioner contends that the interpretation put upon this Act of Congress by the Honorable Circuit Court of Appeals is not only inequitable and impractical but it is a reading into the statute of something that is not there, for it amounts to assessing the estate of decedent with a taxable gain when, as a matter of fact, no gain whatsoever resulted to the estate, or, in the language of the Court of Claims in the *Elmhurst* case:

> "To make the value as of the death of the testator would be a plain alteration and a change in the statute and its declared purposes."

Conclusion.

For the reasons above stated it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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(5790-C)